IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2763 OF 2005

IN

SUMMONS FOR JUDGMENT NO.420 OF 2004

IN

SUMMARY SUIT NO.1326 OF 2004

Shriyam Broking Intermediary Ltd. ...Plaintiffs

v/s

Maharashtra Krishna Valley Development Corporation ...Defendants

Mr Virag Tulzapurkar with Ms S. Srikrishna i/b M/s Junnarkar and Associates for Plaintiffs.

Mr Pankaj Das for Defendants.

CORAM : D.K. DESHMUKH J.

DATE : 24TH APRIL 2007.

P.C. :-

1. This is a notice of motion taken out by the defendants. The plaintiffs had filed summary suit No.1326 of 2004 for recovery of an amount of 56,23,000/- with interest from the date of filing of the suit till the date of realisation. The defendants are a Statutory Corporation. The defendants desired to make an issue of bonds on private placement basis and decided to appoint Lead Arrangers in respect of the said bonds. The correspondence was exchanged between the parties in relation to appointment of the plaintiffs as Lead Arrangers. According to the plaintiffs, the defendants addressed a letter dated 28th September 2001, copy of which is at Exh.'C' to the plaint, informing the plaintiffs, that the defendant Corporation is pleased to appoint plaintiffs as Lead Arrangers on the terms and conditions which were mentioned in the letter. So far as the fees are concerned, it was stated that the plaintiffs will be paid at the rate of 0.2 % of the amount subscribed and retained by the Corporation. According to this letter, parties were to enter into a contract. According to the plaintiffs, the contract dated 12th November 2001 was entered into between the parties. Clause (c) of the contract deals with the fees payable to the plaintiffs. After the issue was closed,

the Registrars of the issue supplied information to the plaintiffs and the defendants. On the basis of the information supplied by the Registrars, the plaintiffs alongwith letter dated 21st May 2002 sent their bill for the fees which was for Rs.87,93,800/-. That bill is dated 21st May 2002. Despite receiving this bill, there was no response from the defendants. Therefore, a letter dated 15th June 2002 was addressed demanding the payment of the bill. There was no response to that letter. Therefore, again a letter dated 3rd July 2002 was addressed demanding the payment. Since there was no response to this letter also, a letter dated 26th July 2002 was addressed to the plaintiffs. It is thereafter that the plaintiffs received response from the defendants. The letter of the defendants is dated 26th August 2002 and it is signed by Chief Accounts and Finance Officer of the defendants. It was stated in that letter that with reference to the invoice for payment of Lead Arrangers' fees payable to the plaintiffs by the defendants, the defendants will be shortly releasing the payment. According to the plaintiffs, despite acknowledging their liability to make the payment as per the bill, the defendants did not make payment, therefore, a letter dated 19th October 2002 was addressed by the plaintiffs to the defendants stating therein that except payment of Rs.10,00,000/-, no further payment has been made. There was no response

from the defendants. Therefore a letter dated 6th January 2003 was addressed. It appears that some payment was made subsequently but the full amount was not paid. Therefore, a letter dated 27th March 2003 was addressed by the plaintiffs pointing out that out of the total amount of Rs.87,93,800/-, so far only an amount of Rs.31,00,000/- has been received and a request was made for paying the balance amount. Again there was no response. Therefore, a letter dated 7th April 2003 was addressed demanding the balance amount. Again there was no response, therefore a letter dated 27th April 2003 was addressed. There was no response, therefore a notice was served through the Advocate which was duly received, but again there was no response. Ultimately, summary suit was filed. The summary suit was based not only on the memorandum of understanding entered into between the parties on 12th November 2001 but also on the admission of liability contained in the letter dated 26th August 2002. The defendants appeared and therefore summons for judgment was taken out. The defendants filed an application for leave to defend. The first defence of the defendants was that clause (C) of the memorandum of understanding, which is produced in the plaint, is not correct. According to them, the wording of clause (C) of the memorandum of understanding is different. Therefore, the Court made an order dated 12th April 2005 directing the defendants to deposit the

original memorandum of understanding in the Court. Then an affidavit was filed on behalf of the defendants dated 21st April 2005 stating that what they have in their possession is the draft memorandum of understanding and not the original final memorandum of understanding. The summons for judgment came up for hearing before the Court on 22nd August 2005. The plaintiffs were represented by a lawyer before the Court but the defendants remained absent. The Court heard the plaintiffs, considered the reply filed on behalf of the defendants and passed an order on merits holding that the defendants are not entitled to any leave to defend and decreed the suit in favour of the plaintiffs. This notice of motion is taken out by the defendants in these circumstances for setting aside the decree that is passed and for grant of leave to defend the suit.

2. The first submission of the learned counsel appearing for plaintiffs is that clause (C) of the memorandum of understanding which is relied on by the plaintiffs is not correctly worded. According to the learned counsel, the correct version of clause (C) was produced by the defendants. The learned counsel then submitted that even assuming that the correct version of clause (C) as found in the memorandum of understanding produced by the plaintiffs is assumed to be correct, then also the plaintiffs are not entitled to receive

fees on the entire issue but only the bonds which were sold to their clients. The learned counsel then submits that the learned Judge was also not justified on relying on the letter dated 26th August 2002 because that letter was issued by mistake.

3. The learned counsel appearing for plaintiffs, on the other hand, pointed out that the correspondence placed on record by the plaintiffs shows that it is the defendants who had approached the plaintiffs for appointing the plaintiffs as Lead Arrangers on the terms and conditions which are contained in the letter dated 28th September 2001 and the letter dated 28th September 2001 contemplates incorporation of the terms and conditions which are mentioned in the letter dated 28th September 2001 in the memorandum of understanding. According to the leaned counsel therefore, even if the memorandum of understanding is ignored and the terms contained in the letter dated 28th September 2001 are taken into consideration, then also it is apparent that the fees charged by the plaintiffs were as per the agreement between the parties. The learned counsel submits that in any case, the Court has rightly held that the explanation given by the defendants to their letter dated 26th August 2002 is incapable of being accepted. Now in the light of these rival submission, if one peruses the order dated 22nd August 2005, it

becomes clear that the Court has based its order on two counts viz. (1) that the plaintiffs have produced correct version of clause (C) of the memorandum of understanding dated 12th November 2001 and (2) that in any case by letter dated 28th June 2002 the liability has been admitted by the defendants. So far as the first aspect of the matter is concerned, from the affidavit filed by the defendants after the Court directed them to produce the original copy of the memorandum of understanding, it was made clear that the defendants do not have the original copy of the memorandum of understanding which incorporates clause (C) in any way different from the wordings which are incorporated in the memorandum of understanding, copy of which is produced by the plaintiffs. In my opinion, the letter dated 28th June 2002 is crucial. Perusal of that letter shows that by that letter, the defendants informed the plaintiffs that the defendants are appointing plaintiffs as Lead Arrangers on the terms and conditions which are mentioned in that letter. Clause (C) of those terms and conditions deals with fees and service charges. It reads as under :-

> "6. Fee / Service Charges :- (a) The Arranger(s) will be paid total service charges at the rate of 0.2 % (zero point two percent) of the amount subscribed and retained by the

Corporation."

. It is stated in the letter that the parties have to enter into regular contract by signing a memorandum of understanding with detailed terms and conditions. Therefore, the terms and conditions which are mentioned in the letter are to be incorporated in the memorandum of understanding. It is nobody's case that between the date on which the letter was sent i.e. 28th September 2001 and the date when memorandum of understanding was signed i.e. 12th September 2001, the parties have agreed on any variation of the terms of the memorandum of understanding. Therefore, it is obvious that it is the term which is contained in the letter dated 28th September 2001 which was to be incorporated in the memorandum of understanding. Clause (C) of the memorandum of understanding, copy of which is at Exh.'D' to the plaint, reads as under :-

> "C. The Lead Arranger shall be entitled to receive as fees for services as Lead Arranger, rendered by them for the private placement of the MKVDC bonds @ 0.2 % (Zero Point Two Percent) of amount retained. The fees shall be all inclusive and no out of pocket expenses etc. shall be paid. The fees shall be paid in two instalments. The instalment of fees

> equal to 90 % of the total fees payable shall be paid after the issue is fully subscribed including retention of over subscription. The second instalment of fees equal to 10 % of the total fees payable shall be paid after the post issue services part excluding despatch of letters of allotments is completed. The Lead Arranger shall present necessary bills for the payment of fees at appropriate time after the service to be rendered is completed, giving documentation in support thereof, wherever necessary."

. If one compares clause (C) of the memorandum of understanding with clause 6 of the letter dated 28th September 2001, it is clear that the two are in agreement with each other. If one peruses the additional sentence which according to the defendants was incorporated in clause (C), it will be contrary to what is contained in the clause 6 of the letter dated 28th September 2001. Thus, according to me, not only the view that has been taken by the learned Single Judge in relation to the wording of clause (C) of the memorandum of understanding is correct, but that is the only possible view of the memorandum of understanding. It is clear from the plaint that the plaintiffs are also relying in the plaint on the admission of liability

contained in the letter dated 26th August 2002. That letter is written on behalf of the defendant Corporation by Chief Accounts and Finance Officer. That letter has been issued with reference to the invoice for payment of bill submitted by the plaintiffs and the letter states thus :-

> "This has reference to your invoice for payment of Lead Arrangers fees payable to you for MKVDC Bonds Series 2001/A. We will be shortly releasing the payment for the above.
> Till then, kindly bear with us."

. The only explanation that is given about this letter by the defendants in the affidavit filed for leave to defend is thus :-

> "I further state that so far as the letter which is annexed at Exh.'I' was mistakenly sent by our Chief Accounts and Finance Officer. There is no exact amount mentioned in it and tenor of the letter is just to say that payment will be released and no specific assurance is given and therefore this letter will not be taken into consideration and referring it as Defendant has verified the position and found that the sum of

Rs.87,93,800/- was due and payable."

. The letter is signed by the Chief Accounts and Finance Officer of the defendants. It is not the case of the defendants that this Officer did not have authority to acknowledge liability on behalf of the Corporation. No affidavit of the concerned Officer has been filed to show that he was under any mistake when he wrote the letter. Perusal of the letter shows that it specifically refers to the invoice sent by the plaintiffs for payment of their fees and it states that the payment will be released shortly. In my opinion, this is the clearest form of admission that can be given by the defendants. In my opinion, leaving all other aspects aside, the Court would have been justified in passing a decree on admission on the basis of this letter. Therefore, in my opinion, the Court was perfectly justified in holding that the defendants are not entitled to any leave to defend in view of the clear admission. Thus, looking at the matter from any point of view, the Court was perfectly justified in passing the decree against the defendants. I do not see any special circumstance for modifying or varying the order impugned. Notice of motion is disposed off.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as

true copy.

. Certified copy expedited.